SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 145

LOUISE A. WHITCOMB,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

INDEX

	Original	Print
Proceedings before U. S. Board of Tax Appeals	1	1
Docket entries	1	1
Petition (omitted in printing)	2	
Answer (" " ")	5	
Consolidated amended petition (" " ")	6	
Answer to consolidated amended petition (omitted in printing)	13	
Findings of fact and opinion (omitted in printing)	15	
Decision	24	3
Petition for review and assignments of error	25	4
Statement of evidence (omitted in printing)	28	
Præcipe for record (" " ")	64	
Certificate of clerk (" " ")	65	
Orders enlarging time	65	7
Proceedings in Court of Appeals of District of Columbia	67	9
Stipulation as to consolidation, etc	67	9
Argument and submission	68	10
Opinion, Martin, J., cause No. 5665	69	11
Judgment, cause No. 5665	69	11
Designation of record	70	12
Clerk's certificate	71	13
Stipulation as to consolidation, etc	71	14
Opinion, Martin, J., cause No. 5664	73	15
Dissenting opinion, Groner, J., cause No. 5664	83	25
Judgment, cause No. 5664	85	27
Order allowing certiorari	87	27
Stipulation as to records, etc	88	28

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 16, 1933

[fols. a-1] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 16118

LOUIS A. WHITCOMB, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

For taxpayer: Alfred Sutro, Esq., F. T. Smith, Esq., V. K. Butler, Esq., Robert Littleton, Esq.
For commissioner: John D. Foley, Esq.

DOCKET ENTRIES

1926.
May 19. Petition received and filed.
" 21. Copy of petition served on solicitor.
" 21. Notification of receipt mailed taxpayer.
July 16. Answer filed by solicitor.
Aug. 25. Copy of answer served on taxpayer. General Calendar.
1928.
June 30. Hearing date set 10-23-28.
Oct. 17. Motion for transfer to Reserve Cal. filed by taxpayer. See 16117.
" 18. Motion granted.
1929.
Mar. 11. Hearing set Apr. 12, 1929.
Apr. 5. Motion to place on Reserve Cal. filed by G. C. See 16121. 4-8-29. Granted.
Apr. 8. Motion to place on Reserve Cal. filed by taxpayer. No action necessary.
Nov. 19. Hearing set Jan. 24, 1930.
" 26. Motion to place on Cir. Cal. for hearing in San Francisco filed by taxpayer. See 16117.
" 29. Motion granted.
1930.
Mar. 11. Hearing set May 19, 1930, San Francisco, Calif.
Apr. 19. Motion to consolidate with dkts. 16117 to 16122, 27940 to 27944, and 46510 to 46513, and to amend petition, amendment tendered, filed by taxpayer 4-19-30. Granted.
" 24. Copy of amended petition served on G. C.

May 19. Hearing had before Mr. Marquette on merits and motion to consolidate for hearing and decision with dkts. 46510-11-12-13-27940-41-42-43-44-16117-18-19-20-21-22. Amended answer to be filed by respondent (dictated into record). Briefs due Sept. 1, 1930.

Aug. 16. Stipulation for extension to 10-1-30 to file briefs filed. 8-22-30. Granted.

" 19. Transcript of hearing of May 19, 1930, filed.

Sept. 25. Motion for extension to Oct. 15, 1930, to file brief filed by taxpayer. 9-29-30. Granted. See 16117.

" 29. Brief filed by G. C.

[fols. 2–23]

Oct. 8. Motion for extension to Nov. 1, 1930, to file brief filed by taxpayer. 10-9-30. Granted.

" 31. Brief filed by taxpayer.

1931.

Feb. 11. Findings of fact and opinion rendered, John J. Marquette, Div. 1. Judgment will be entered under Rule 50.

May 20. Notice of settlement filed by G. C.

May 25. Hearing set June 24, 1931, on settlement.

June 13. Consent to settlement filed by taxpayer.

" 25. Decision entered, John J. Marquette, Div. 1.

Dec. 22. Petition for review to Ct. of Ap. of D. C. with assignments of error filed by G. C.

" 22. Proof of service filed.

1932.

Feb. 10. Motion for extension to April 20, 1932, to complete and transmit record filed by G. C.

" 12. Order enlarging time to April 20, 1932, for preparation of evidence and delivery of record entered.

Mar. 17. Statement of evidence lodged.

" 19. Notice of lodgment of statement and of hearing Mar. 30, 1932, filed.

" 30. Hearing had before Miss Mathews on approval of statement of evidence. On motion of counsel for the petitioner to continue and no objection by the respondent, continued to April 13, 1932.

" 30. Order of continuance to April 13, 1932, for hearing on approval of statement of evidence entered.

Apr. 12. Statement of evidence approved and ordered filed.
" 14. Præcipe with proof of service thereon filed.
" 18. Order entered extending time for transmission of record to May 20, 1932.

[fol. 24] BEFORE UNITED STATES BOARD OF TAX APPEALS, WASHINGTON

Docket No. 16118

LOUIS A. WHITCOMB, by JOHN FREULER, Agent, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

DECISION

Pursuant to findings of fact and opinion promulgated February 11, 1931, the respondent herein, to-wit, on May 20, 1931, having filed a proposed redetermination for the year 1921, and the petitioner on June 13, 1931, having filed notice of acquiescence to the said proposed redetermination, it is

[fol. 25] Ordered and decided that there is a deficiency for the year 1921 in the amount of $31.89.

(Signed) John J. Marquette, Member.

Entered June 25, 1931.

A true copy. Teste:
B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

IN COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

Docket No. 16118

DAVID BURNET, Commissioner of Internal Revenue,
Petitioner,

v.

LOUIS A. WHITCOMB, Respondent

PETITION FOR REVIEW AND ASSIGNMENTS OF ERROR—Filed Dec. 22, 1931

To the Honorable Judges of the Court of Appeals of the District of Columbia:

Now comes David Burnet, Commissioner of Internal Revenue, by his attorneys, G. A. Youngquist, Assistant Attorney General, C. M. Charest, general counsel, Bureau of Internal Revenue, and John D. Foley, special attorney, Bureau of Internal Revenue, and respectfully shows:

I

The petitioner for review (hereinafter referred to as the commissioner) is the duly appointed and qualified Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States. The respondent (hereinafter referred to as the taxpayer) is an individual citizen and resident of the French Republic and is not an inhabitant of any judicial circuit of the United States.

II

The commissioner determined a deficiency in income tax for the calendar year 1921 in the amount of $524.78, and on March 23, 1926, in accordance with the provisions of subdivision (a) of section 283 of the revenue act of 1926, sent to the taxpayer by registered mail a notice of said deficiency. Thereafter the taxpayer duly appealed said notice of deficiency to the United States Board of Tax Appeals. Said appeal was heard by said board on May 19, 1930. On February 11, 1931, said board promulgated its interlocutory decision containing its findings of fact and opinion, and on June 25, 1931, entered its order of redetermination wherein

[fol. 26] it ordered and decided that there was a deficiency in income tax for the calendar year 1921 in the amount of $31.89.

During the calendar year 1921 the taxpayer was one of the beneficiaries of a trust established under the will of one A. C. Whitcomb, deceased. By the terms of said decedent's will the income of the trust was required to be distributed among the beneficiaries thereof. During the calendar year 1921 the trust property sustained depreciation in the amount of $43,003.16. In distributing the income of the trust among the beneficiaries, the trustee did not take into account the depreciation sustained by the property of the trust, but distributed to each beneficiary his or her proportionate part of the income of the trust without regard to any depreciation. The decedent's will was silent upon the question whether depreciation was to be taken into account in determining the income of the trust available for distribution among the beneficiaries. On September 5, 1928, the trustee filed his account covering the period from February 23, 1913, to February 23, 1928, with the superior court for the city and county of San Francisco, California, together with a petition that the account be approved. The account was objected to by two of the remaindermen of the trust. On September 19, 1928, the court entered a decree whereby it found that the trustee's action in not reserving necessary amounts for depreciation before distributing the income of the trust among the beneficiaries was improper and whereby it directed that the recipients of the income of the trust for the period from February 23, 1913, to February 23, 1927, pay back to the trustee the excess amounts received by them. On January 17, 1929, the taxpayer executed and delivered to the trustee her promissory note for the amount by which the distributions made to her from February 23, 1913, to February 23, 1927, exceeded the distributions which would have been made had the trustee retained a reserve for depreciation of the trust property. The note bears no interest and by its terms is payable at the termination of the trust. In her income-tax return for the calendar year 1921 the taxpayer reduced her taxable income by the proportion which the depreciation sustained by the trust bore to the net income of the trust before the deduction for depreciation. The commissioner increased her taxable income by this amount, but the Board refused to allow such increase to be made.

III

The commissioner says that in the record and proceedings before the Board of Tax Appeals and in the decision and order of redetermination promulgated and entered by the Board of Tax Appeals manifest error occurred and intervened to the prejudice of the commissioner, and the commissioner assigns the following errors, and each of them, which, he avers, occurred in the said record, proceedings, decision and order of redetermination and upon which he relies to reverse the said decision and order of redetermination so promulgated and entered by the Board of Tax Appeals, to wit:

[fols. 27-64] 1. The board erred in holding that the distributions made by the trustee to the taxpayer were not income to thetaxpayer in their entirety.

2. The board erred in holding that it made no difference that the so-called excessive distributions to the taxpayer were never paid back.

3. The board erred in holding that the distributions of the income of the trust received by the taxpayer without diminution on account of depreciation sustained by the trust property were not taxable income in their entirety to the taxpayer.

4. The board erred in holding that the giving of a non-interest bearing promissory note not payable until the death of a person in being was equivalent to the repayment by the taxpayer of any income received by the taxpayer in the taxable year.

5. The board erred in holding that the decree of a court passed in a subsequent year in a freindly suit to which the Government was not a party could affect the Government's right to income taxes in the year in which the income was received.

6. The board erred in not approving the deficiency proposed for assessment by the commissioner.

Wherefore, the commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the Court of Appeals of the District of Columbia, that a transcript of the record be prepared in accordance with law and with the

rules of said court and transmitted to the clerk of said court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

G. A. Youngquist, Assistant Attorney General.
C. M. Charest, General Counsel, Bureau of Internal Revenue. Of Counsel: John D. Foley, Special Attorney, Bureau of Internal Revenue.

Duly sworn to by C. M. Charest. Jurat omitted in printing.

[fol. 65] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 16118

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

v.

LOUIS A. WHITCOMB, Respondent

ORDER ENLARGING TIME

Upon motion of counsel for the petitioner, it is

Ordered: That the time for preparation of evidence and for transmission and delivery of the record sur petition for [fol. 66] review of the above entitled proceeding in the Court of Appeals for the District of Columbia, be and it is hereby extended to April 20, 1932.

(Signed) Logan Morris, Member.

Dated Washington, D. C., February 12, 1932.

True copy. Teste:

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 16118

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

v.

LOUIS A. WHITCOMB, Respondent

ORDER ENLARGING TIME

For cause appearing of record, it is

Ordered: That the time for transmission and delivery of the record sur petition for review of the above-entitled

proceeding in the Court of Appeals for the District of Columbia, be and it is hereby extended to May 20, 1932.

(Signed) Logan Morris, Member.

Dated Washington, D. C., April 18, 1932.

A true copy. Teste:

B. D. Gamble, Clerk U. S. Board of Tax Appeals.

(Seal.)

IN THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA,
APRIL TERM, 1932

No. 5664

DAVID BURNET, Commissioner of Internal Revenue,
Petitioner,

v.

MARGUERITE T. WHITCOMB, Respondent

No. 5665

DAVID BURNET, Commissioner of Internal Revenue,
Petitioner,

v.

LOUISE A. WHITCOMB, Respondent

No. 5667

DAVID BURNET, Commissioner of Internal Revenue,
Petitioner,

v.

CHARLOTTE A. W. LEPIC, Respondent

STIPULATION

It is hereby stipulated as follows:

The decision in Number 5664 shall control the decision in the following Numbers: 5667, 5669, 5671, 5672, 5674. If judgment shall be rendered for the respondent in Number 5664, the decision of the Board of Tax Appeals shall be affirmed in each of the cases mentioned in this paragraph. If judgment shall be rendered for the petitioner in Number 5664, judgment shall also be rendered for the petitioner in the above cases for the respective amounts therein involved.

The decision in Number 5665 shall control the decision in the following Numbers: 5666, 5668, 5670, 5673, 5675. If judgment shall be rendered for the respondent in Number 5665, the decision of the Board of Tax Appeals shall be affirmed in each of the cases mentioned in this paragraph. If judgment shall be rendered for the petitioner in Number

5665, judgment shall also be rendered for the petitioner in each of the other cases mentioned in this paragraph for the respective amounts therein involved.

No. 5665 shall be heard with No. 5664, but the parties may present separate briefs in that case, and nothing contained in any previous stipulation shall be construed as requiring the decision in No. 5665 to be controlled by the decision in No. 5664.

G. A. Youngquist, Attorney for Petitioner. (Signed) W. W. Spalding, Attorney for Respondents.

Dated Feby. 25, 1933.

[Endorsed:] Nos. 5664, 5665, 5667. Burnet v. Whitcomb et al. Stipulation. Court of Appeals, District of Columbia. Filed Feb. 27, 1933. Henry W. Hodges, Clerk.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA,

Monday, March 13th, A. D. 1933.

* * * * * * *

No. 5664

DAVID BURNET, Commissioner of Internal Revenue, Appellant,

vs.

MARGUERITE T. WHITCOMB, by JOHN FREULER, Agent,

and No. 5665

DAVID BURNET, Commissioner of Internal Revenue, Appellant,

vs.

LOUIS A. WHITCOMB

The argument in the above entitled causes was commenced by Mr. William Cutler Thompson, attorney for the appellant, and was continued by Mr. Claude R. Branch, attorney for the appellees, and was concluded by Mr. William Cutler Thompson, attorney for the appellant.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 5665

DAVID BURNET, Commissioner of Internal Revenue,
Appellant,

v.

LOUIS A. WHITCOMB

Appeal from the Board of Tax Appeals

(Argued March 13, 1933. Decided May 22, 1933)

G. A. Youngquist, Sewall Key, C. M. Charest, and John D. Foley, all of Washington, D. C., for appellant.

Claude R. Branch, of Boston, Mass., and W. W. Spaulding, of Washington, D. C. for appellee.

Before Martin, Chief Justice, and Robb, Van Orsdel, Hitz, and Groner, Associate Justices

MARTIN, Chief Justice:

The issues in this appeal are controlled by the same principles as those in case No. 5664 which is concurrently decided by us.

The decision of the Board of Tax Appeals is accordingly reversed and the cause is remanded for further proceedings not inconsistent herewith.

Mr. Justice Groner dissents.

A true copy. Teste:

——, Clerk Court of Appeals, D. C.

Monday, May 22nd, A. D. 1933.

* * * * * * *

No. 5665, April Term, 1933

DAVID BURNET, Commissioner of Internal Revenue,
Appellant,

vs.

LOUIS A. WHITCOMB

Appeal from the Board of Tax Appeals

This cause came on to be heard on the transcript of the record from the Board of Tax Appeals and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decision of the said Board of Tax Appeals in this cause be, and the same is hereby, reversed, and that this cause be and the same is hereby remanded to the said Board of Tax Appeals for further proceedings not inconsistent with the opinion of this Court.

Per Mr. Chief Justice Martin, May 22, 1933.

Mr. Justice Groner dissenting.

IN THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA,
APRIL TERM, 1932

No. 5665

DAVID BURNET, Commissioner of Internal Revenue,
Petitioner,

vs.

LOUISE A. WHITCOMB, Respondent

DESIGNATION OF RECORD

To the Clerk of the Court of Appeals of the District of Columbia:

Will you please make up, for use in application for writ of certiorari, a certified record in the above entitled proceeding, including therein the following:

1. Printed record.
2. Stipulation filed February 27, 1933, that Docket Nos. 5666, 5668, 5670, 5673 and 5675 abide the decision in 5665.
3. Argument.
4. Opinion and dissenting opinion.
5. Judgment.
6. This designation.
7. Certificate.

(Signed) W. W. Spalding, Attorney for Respondent.

[Endorsed:] No. 5665. David Burnet, Commissioner of Internal Revenue, vs. Louise A. Whitcomb, Respondent. Filed June 8, 1933. Designation of record on petition for certiorari to S. C. U. S. W. W. Spalding, Atty. for Respondent. Court of Appeals, District of Columbia. Filed Jun. 8, 1933. Henry W. Hodges, Clerk.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 74, inclusive, constitute a true copy of the transcript of record and proceedings of said Court of Appeals as designated by counsel in the case of David Burnet, Commissioner of Internal Revenue, Appellant, vs. Louis A. Whitcomb, No. 5665, April Term, 1933, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 8th day of June, A. D. 1933.

Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia. (Seal Court of Appeals, District of Columbia.)

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1932

No. —

(D. C. A. 5665)

LOUISE A. WHITCOMB, Petitioner,

vs.

DAVID BURNET, Commissioner of Internal Revenue, Respondent

(D. C. A. 5666)

LYDIA L. WHITCOMB, Petitioner,

vs.

DAVID BURNET, Commissioner of Internal Revenue, Respondent

(D. C. A. 5668)

LOUISE A. F. E. WHITCOMB, Petitioner,

vs.

DAVID BURNET, Commissioner of Internal Revenue, Respondent

(D. C. A. 5670)

LYDIA L. I. WHITCOMB, Petitioner,

vs.

DAVID BURNET, Commissioner of Internal Revenue, Respondent

(D. C. A. 5673)

LYDIA LOUISE IDA WHITCOMB, Petitioner,

vs.

DAVID BURNET, Commissioner of Internal Revenue, Respondent

(D. C. A. 5675)

LOUISE A. F. E. WHITCOMB, Petitioner,

vs.

DAVID BURNET, Commissioner of Internal Revenue, Respondent

STIPULATION

It is hereby stipulated as follows:

In the Courts below the above entitled proceedings were consolidated and heard as one cause upon one record; and in the Courts below it was agreed that the decision in cause No. 5665 below should control the decision in the following numbered causes: 5666, 5668, 5670, 5673 and 5675 below.

It is now agreed between the parties, that in order to save costs and avoid duplication, the application for writs of certiorari may be made in consolidated form upon one supporting record and brief; and that the judgment of the Court in cause No. 5665 below, under the docket number assigned to it herein, may be treated as the judgment of the Court in numbers 5666, 5668, 5670, 5673 and 5675, below, under the docket numbers assigned to them herein.

Dated at Washington, D. C., this the 6th day of June, 1933.

W. W. Spalding, Attorney for Petitioners. J. Crawford Biggs, Sol. Gen'l, Attorney for Respondent.

[fol. 73] IN COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 5664

DAVID BURNET, Commissioner of Internal Revenue, Appellant,

v.

MARGUERITE T. WHITCOMB, by JOHN FREULER, Agent, Appellee

Appeal from the Board of Tax Appeals

(Argued March 13, 1933. Decided May 22, 1933)

G. A. Youngquist, Sewall Key, Wm. Cutler Thompson, C. M. Charest, Dewitt M. Evans, and John D. Foley, all of Washington, D. C., for appellant.

Claude R. Branch, of Boston, Mass., and W. W. Spaulding, of Washington, D. C., for appellee.

Before Martin, Chief Justice, and Robb, Van Orsdel, Hitz, and Groner, Associate Justices

OPINION

MARTIN, Chief Justice:

This appeal involves income taxes for the year 1921, and is prosecuted by the Commissioner of Internal Revenue from an order of redetermination of the Board of Tax Appeals.

The controversy relates to the estate of A. C. Whitcomb, deceased, a resident of the State of California, who died in the year 1889, leaving a last will which was admitted to probate by the Superior Court of San Francisco. The decedent left surviving him his widow, Louise P. V. Whitcomb, a daughter, Charlotte A. W. Lepic, and a son, Adolph Whitcomb. The latter died on September 5, 1914, survived by his widow, Marguerite T. Whitcomb, the respondent [fol. 74] herein, and his children, Louise A. Whitcomb and Lydia L. Whitcomb.

Item seventh of decedent's will reads as follows:

"7th. I give to my hereinafter named executor, Jerome Lincoln, of said San Francisco, all the rest of my property, real, personal, or mixed, except what I may have in France, of every kind and nature and not hereinbefore disposed of, after the payment of my debts, in trust, nevertheless, to pay over to my said wife, Louise Palmyre Bion Whitcomb, one-third part of the interest thereon or income therefrom for and during her natural life, and the other two-thirds parts to my two children, born of her: One, Adolph, born on or about the 23rd day of February, 1880, and the other, Charlotte Andree, born on or about the 4th day of December, 1882, with the reversion or remainder of the whole three-thirds parts to the descendants 'per stirpes' of the said two children, if any be alive at the time of the death of the said two children; and if none be alive at that time, to Harvard College, in conformity with the provisions named or indicated in section six (6) of this will, having reference to said Harvard College."

The will contains no directions as to the manner in which the income from the trust shall be computed, and makes no provision relating to depletion nor a depletion reserve fund.

Since the year 1905 James Otis has served as trustee of the trust thus created. The original trust estate consisted largely of cash, bonds, stocks, and notes. On February 23, 1906, the trust estate consisted of similar securities of a total value of more than $3,000,000, together with certain parcels of real estate, most of which were in San Francisco. On April 18, 1906, the San Francisco earthquake and fire occurred. All of the improvements on the San Francisco real estate owned by the trust were destroyed by the fire. Some time after this the trustee adopted the policy of improving the real estate owned by the trust and of converting the other assets of the estate to accomplish that purpose. As a result of this policy and of the acquisition of additional parcels of real estate, the assets of the trust for several years prior to 1921, and during the years 1921 to 1926, inclusive, consisted almost entirely of improved [fol. 75] real estate, including the Whitcomb Hotel and its furniture and equipment. The latter item represented an investment of more than $2,000,000.

During the years 1921 to 1926, inclusive, the trust estate suffered exhaustion, wear, and tear, as follows:

1921	$43,003.16	1924	$39,258.00
1922	39,408.00	1925	39,108.00
1923	39,408.00	1926	55,833.00

The trustee of the trust filed fiduciary income-tax returns for the years 1921 to 1926, inclusive, and deducted in computing the net income of the trust for each year the respective amounts above set forth, representing exhaustion, wear, and tear sustained by the trust. The trustee, however, did not withhold these amounts or any part of the income of the trust estate from the beneficiaries to whom income payments were due, and each of them received his undiminished share of the income of the trust. From 1903 to 1928 the trustee presented an annual account of his proceedings to the beneficiaries, but did not file any account in the Superior Court of San Francisco, which had jurisdiction over the trust. However, on September 5, 1928, the trustee filed with the court an account covering the period from February 23, 1903, to February 23, 1928, and setting out all of the payments made to the beneficiaries during that period. This was accompanied by a petition for its allowance.

The allowance of the account was opposed by Napoleon Charles Louis Lepic and Charlotte de Rouchechouart, children of Charlotte A. W. Lepic, one of the beneficiaries herein, who are two of the remaindermen entitled to part of the corpus of the trust upon the termination thereof, if they be then living. In their objections, which were filed with the court, they alleged that the trust property had sustained depreciation during the years 1913 to 1927, inclusive, in the amount of $622,434.11; that no reserve or other provision for such depreciation had been made from the gross income of the trust estate; that such amount of $622,434.11 had been paid by the trustee to the beneficiaries as income of the trust, thus impairing the trust property to that extent, and they prayed that the trustee be charged therewith. All of the parties interested in the trust estate were notified of the filing of the account and of the objec- [fol. 76] tions, and were represented by counsel at the hearing held thereon.

On September 19, 1928, the court entered an order in the matter which is in part as follows:

"It is hereby ordered, adjudged, and decreed that the objection of said Napoleon Charles Louis Lepic and Charlotte de Rochechouart to said account that no reserve or other provisions for annual depreciation for the years 1913 to 1927, both inclusive, as set forth in said objections, has been made, be, and the same is hereby, sustained; that the amount specified in said objections for each of said respective years from 1913 to 1927 is a proper amount to be allowed for depreciation, said amount for each of said respective years being as follows, to wit:

1913	$23,751.00
1914	23,070.00
1915	23,748.00
1916	31,248.00
1917	41,222.83
1918	55,302.96
1919	56,273.93
1920	55,585.23
1921	43,003.16
1922	39,408.00
1923	39,408.00
1924	39,258.00
1925	39,108.00
1926	55,833.00
1927	56,214.00

"that James Otis, the said trustee, made the disbursements as stated in his said fourteenth account without deduction of reserves or other provision for depreciation, under and pursuant to the advice of counsel learned in the law and retained by said trustee, to the effect that under and by virtue of the terms of said trust it was the duty of said trustee to make such disbursements with such deduction; that said trustee in making said disbursements without such deduction was entitled to rely upon said advice of the said counsel, and that said disbursements were so made by said trustee in good faith and without objection on the part of either the said Napoleon Charles Louis Lepic and/or the [fol. 77] said Charlotte de Rouchechouart, or any other person interested in said trust, and that no personal liability

of any kind or nature should or does attach to said trustee or to said James Otis by reason of having made such disbursements or any of them without deductions.

"It is further ordered, adjudged, and decreed that the recipients of the income of said trust estate during the period from February 23, 1913, to February 23, 1927, repay to the said trustee the respective amounts received by them during the years 1913 to 1927, both inclusive, as set forth in said objections of the said Napoleon Charles Louis Lepic and Charlotte de Rochechouart as the respective amount which should have been retained by said trustee as a reserve for depreciation for each of said years 1913 to 1927, both inclusive.

"It is further ordered, adjudged, and decreed that from and after the year ending February 23, 1927, and until the termination of said trust, the said trustee withhold annually as a reserve for depreciation from the income from the trust property such an amount as may be proper according to the rules and regulations prescribed by the Government of the United States in connection with income-tax returns, and if there be no such rules or regulations then such an amount as may be reasonable and proper.".

Thereupon, on January 17, 1929, Louise A. Whitcomb, Marguerite T. Whitcomb, Lydia L. Whitcomb, Charlotte A. W. Lepic, Napoleon Charles Louis Lepic, and Charlotte de Rochechouart, acting in conformity with the court's order, executed and delivered to the trustee their promissory notes for the amounts by which the distributions made to them exceeded the distribution which would have been made had the trustee retained a reserve for depreciation of the trust property. The notes were to bear no interest and were made payable at the termination of the trust—that is, upon the death of Charlotte A. W. Lepic.

The respondent in her return of income for the year 1921 did not include the full amount paid to her by the trustee, but omitted therefrom her proportionate share of the depreciation deducted on the fiduciary return of the estate. The Commissioner increased the income shown on the return by such proportionate share of the depreciation and [fol. 78] determined a deficiency in tax accordingly. The Board of Tax Appeals, six members dissenting, reversed and set aside the determination of the Commissioner, who then appealed for a review by this court.

The question at issue is whether respondent, as life beneficiary under the testamentary trust aforesaid, is entitled to a deduction for depreciation of the corpus of the trust, notwithstanding that she received from the trustee her full share of the accruing income of the trust undiminished because of depreciation or otherwise. The statute involved reads as follows:

"Revenue Act of 1921, c. 136, 42 Stat. 227

"Sec. 219. (a) That the tax imposed by sections 210 and 211 shall apply to the income of estates or of any kind of property held in trust, including——

* * * * * * *

"(4) Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct.

* * * * * * *

"(d) In cases under paragraph (4) of subdivision (a), and in the case of any income of an estate during the period of administration or settlement permitted by subdivision (c) to be deducted from the net income upon which tax is to be paid by the fiduciary, the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not, or, if his taxable year is different from that of the estate or trust, then there shall be included in computing his net income his distributive share of the income of the estate or trust for its taxable year ending within the taxable year of the beneficiary. In such cases the beneficiary shall, for the purpose of the normal tax, be allowed as credits, in addition to the credits allowed to him under section 216, his [fol. 79] proportionate share of such amounts specified in subdivisions (a) and (b) of section 216 as are received by the estate or trust."

The present issue may be considered first as the case stands without regard to the decision of the California

court. The authorities up to that time were unanimous in support of the proposition that a life beneficiary of a trust estate is taxable upon the full amount of income actually received by or distributable to him during the taxable year, without deduction for depreciation sustained by the corpus of the trust.

In Baltzell v. Mitchell, 3 F. (2d) 428 (C. C. A. 1st), certiorari denied, 268 U. S. 690, it was held that under the Revenue Act of 1918, sec. 219, subd. (d), the life beneficiary of the income of a trust estate is taxable on the income actually received by or distributable to him, without deduction for losses to the capital of the estate incurred during the year. In Abell v. Tait, 30 F. (2d) 54 (C. C. A. 4th), a case presenting similar facts, a similar decision was reached.

In the case of Whitcomb v. Blair, 25 F. (2d) 528, involving the same beneficiary, the same trust, and the same question as is presented in the present case, although for a prior taxable year, we held against the claim of the life beneficiary in the following terms:

"The appellant as life tenant in the trust estate was entitled to receive the full one ninth of the income therefrom, without regard to exhaustion or wear and tear of the corpus of the estate, and this is what appellant actually received from the trustee as her distributive share of the income. The trustee was not entitled to withhold any part of her share of the income of the trust estate in order to make good the exhaustion or wear and tear of the capital assets of the estate; nor did the trustee in fact do so. Capital losses in such cases fall upon the reversioners or remaindermen and not upon the life tenant. Therefore, the payment made by the trustee to appellant was in fact and law the distributive share of the income to which she was entitled as life tenant and consisted in no part of capital depreciation restored to her. It was therefore taxable in her hands. This conclusion is not negatived by the fact that the trustee was entitled to enter deductions for capi- [fol. 80] tal losses or gains in his return for the trust estate as a single entity."

In Kaufman v. Commissioner, 44 F. (2d) 144 (C. C. A. 3rd), the foregoing decision was cited with approval and the court declined to sanction a deduction to a life tenant

for depreciation of buildings, part of the corpus of the trust. In Hubbell v. Burnet, 46 F. (2d) 446 (C. C. A. 8th), certiorari denied, 283 U. S. 840, the decision in Whitcomb v. Blair, supra, was cited with approval and the court held that although certain amounts of depreciation were actually set aside by the trustee, their retention was unauthorized and that they were "distributable" and accordingly were subject to tax. In Codman v. Miles, 28 F. (2d) 823 (C. C. A. 4th), certiorari denied, 278 U. S. 654, the court declined to allow a deduction from the amount actually distributed to a life beneficiary on account of the exhaustion of the corpus, pointing out that such a course of action "would invite as well as permit, to an unlimited extent, subterfuges whereby those entitled to large incomes could avoid their just obligations to the Government." In Codman v. Commissioner, 50 F. (2d) 763 (C. C. A. 1st), involving the same trust as in Codman v. Miles, supra, a similar conclusion was reached. In Roxburghe v. Burnet, 61 App. D. C. —, 58 F. (2d) 693, certiorari denied, 286 U. S. 567, and in Mary Roxburghe v. United States, 64 Ct. Cls. 598, both cases relating to the same taxpayer but to different tax years, the taxpayer claimed a deduction of three per cent from income actually received by her from the trustee on account of depreciation of houses composing the trust property, and the claim was denied in both cases.

The question next arises whether the decision of the California court has made this case an exception to that rule. We think it has not. That decision does not rest upon an interpretation of any statute of California, nor can it be said to rest upon an interpretation of the testator's will.

In American Security and Trust Company v. Paine, 33 App. D. C. 178, we held that in construing a will for the purpose of determining whether it is the duty of the trustee thereunder to pay the entire income derived from a trust fund to the life tenant, or to make certain deductions therefrom for the benefit of the remainderman, the question involved is not to be determined by any arbitrary rule, but [fol. 81] by ascertaining, if possible, the meaning and intention of the testator from the language employed in the creation of the trust, from the relation of the parties to each other, their condition, and the surrounding facts and circumstances of the case.

It is fair to assume in this case that had the testator intended that the trustee should establish such a reserve

fund for depreciation, there would have been apt and effective language in the will to declare that purpose. By the terms of the will the testator undertook to provide for his widow and his two children primarily. They were the principal and immediate objects of his bounty, and it is unreasonable to believe that he intended that the annual payments of income to them should be made dependent upon the vicissitudes attending the corpus of the fund. At the time of the execution of the will the testator's assets consisted almost entirely of notes, bonds, and other like property. It was not until many years after the death of the testator that the assets were in large part converted into improved real estate and the subject of depreciation became one of present importance.

The trustee continued the control of the trust from 1903 to 1928, making annual accounts with the life beneficiaries of the trust, and it appears that during those years no action was taken to establish a reserve for depreciation; nor did the trustee during all of that period file any account of his proceedings with the probate court having jurisdiction over the trust estate. In the year 1928 for the first time, following shortly after the decision of this court in the case of Whitcomb v. Blair, supra, the trustee filed an account in the probate court and the court ordered the trustee to establish a reserve fund for depreciation and determined the amount thereof for the years 1913 to 1927. The life beneficiaries were ordered to refund that amount to the trustee. They did this by executing promissory notes bearing no interest, and payable at the termination of the trust.

It is claimed in effect that this record conclusively establishes the right of the life beneficiaries to deduct from their income-tax returns for the years 1921 to 1926, inclusive, the amounts found to be due in those years to the trustee for the reserve fund for depreciation.

[fol. 82] We are of the opinion, however, that the order of the probate court made in the settlement of the trustee's account is not sufficient authority to overcome the general rule theretofore established under the Federal income-tax law. There are many decisions showing the mutual respect exhibited by the Federal and State courts in dealing with one another's decisions. It seems needless in this case to

enter into a discussion of them, for in our opinion the bare statement of the facts in this case shows that we may without disrespect to the California probate court follow the ruling which this court, respecting this identical trust, reported prior to the decision of that court, and which has since been approved and adopted by the other Federal courts above named.

In Ford v. Commissioner, 51 F. (2d) 206 (C. C. A. 6th), certiorari denied, 284 U. S. 666, it appeared that the executors of an estate which consisted mostly of stocks made a partial distribution in 1920 of the stocks and the legatees received the dividends therefrom in 1922. The probate court in 1926 held the distribution to be premature and ordered the legatees to account for the principal and income of the stocks from the date of distribution up to December 31, 1922. The matter was handled entirely by book entries. The court in passing upon the matter said, in part:

"We think these 1922 dividends were taxable income received by the petitioners during that year. Certainly they then had complete legal title to the stock and to the dividends. If taxes regularly assessed could be invalidated, an indefinite number of years later, by a consent judgment purporting to vacate the title of the taxpayer to the fund he had reported as income, the necessary system of tax collection would be much impaired. The true normal criterion to be applied in this class of case is the actual receipt and retention during the year in question of what was then considered to be income, not whether the taxpayer exposed himself to possible personal liability."

In Fidelity and Columbia Trust Company v. Lucas, 52 F. (2d) 298, the court said:

"Furthermore, it is well settled that a decision of a State court, establishing a local rule of property or construing [fol. 83] a State statute or a contract made after the rights of a litigant in a Federal court suit had accrued, and in a case to which he was not a party, is not binding upon the Federal court."

See also Kuhn v. Fairmont Coal Company, 215 U. S. 349.

Our conclusion herein follows the opinion of the Circuit Court of Appeals for the Ninth Circuit in the case of Com-

missioner v. Freuler, decided January 9, 1933, which related to the identical issue now before us. In respect to the decision of the California court, it says:

"The respondent urges that as the orders of the probate court requiring the amounts of the depreciation reserve so paid to respondent's decedent be repaid to the trust estate, they are binding upon the Federal courts in determining what are proper deductions to be made under the income law. In this connection we must not forget that we are now considering the application of a Federal income taxing statute to the objections and rights of parties in a testamentary trust of real property and not the question of the construction of a State statute or rule of property rights by the highest court of the State. We have here the consideration of orders of the probate court made after hearing objections of the remaindermen to the trustee's account. The account covered the period from 1903 to 1928 and was filed on September 5, 1928. These orders were made on September 19, 1928, some six years after the taxable year 1921. * * * However, no orders of the probate court, the effect of which would relate to what are deductions to be allowed under the national income taxing law, are conclusive and binding on the Federal courts when in considering a revenue act, and the duty of such courts is to exercise its own independent judgment."

In our opinion, therefore, the decision of the Board of Tax Appeals was erroneous; it is reversed and the cause is remanded for further proceedings not inconsistent herewith.

DISSENTING OPINION

GRONER, J., dissenting:

I am unable to agree, and I shall state the reasons of my dissent briefly.

[fol. 84] The question at issue is controlled by the provisions of section 219 of the Revenue Act of 1921. Subdivision (d) of that section imposes a tax on the net income of each beneficiary of an estate or trust received in the taxable year "which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not * * *."

Fairly construed, I think it cannot be doubted that the true test of liability depends upon whether the income is

distributable. If it is, it is taxable whether received or not. If it is not, it would seem to me to follow that it is nontaxable, even though received, as, for instance, by mistake. If I have correctly stated the rule, then it follows that in this case the decision would turn on the question whether the income sought to be taxed was properly distributable to the taxpayer.

In Whitcomb v. Blair, referred to in the opinion of the court, there was agreement between both parties that the taxpayer was entitled to the sums received and taxed, and on that basis we held the taxpayer was "in fact and in law" entitled to receive the income which was taxed. After our decision, two of the remaindermen filed timely objections to the trustee's account. The Superior Court of California having jurisdiction of the trust, all parties in interest being then before the court, entered a decree charging the beneficaries, including taxpayer, in the amount of $622,000 on the ground that that amount, representing depreciation for the years 1913 to 1927, had been unlawfully paid to them by the trustee, and also directing the trustee to withhold annually thereafter for depreciation a reasonable and proper amount from the income of the trust property. One of the beneficiaries paid in cash his share of the amount required to be returned to the trustee, but the others, including taxpayer, gave the trustee their notes bearing interest and payable at the termination of the trust. The acceptance of the notes was apparently with the consent of the remaindermen.

The case, therefore, is one in which a State court having jurisdiction of the estate and of the parties has decreed that the taxpayer was not entitled to certain portions of the income received by her over a period of years, including the year involved here, and that the sum so improperly received should be returned to the trustee, and the court's [fols. 85 & 86] order has been obeyed. If, therefore, the statute taxes only the income properly received, and if the final decree of the State court is in accordance with the California law, as I think it is, and is therefore conclusive and binding, as it seems to me it is (Keith v. Johnson, 271 U. S. 1-8), it would follow necessarily that the final decree of that court forecloses the question.

In this aspect there remains only the question whether the decree of the State court was obtained in a collusive

suit. There is nothing in the record to sustain a contention of that sort.

I think, therefore, the decision of the Board of Tax Appeals should be affirmed.

A true copy. Teste:

——— ———, Clerk Court of Appeals, D. C.

———

IN COURT OF APPEALS OF DISTRICT OF COLUMBIA, APRIL TERM, 1933

* * * * * * *

No. 5664

DAVID BURNET, Commissioner of Internal Revenue, Appellant,

vs.

MARGUERITE T. WHITCOMB, by JOHN FREULER, Agent

Appeal from the Board of Tax Appeals

JUDGMENT—May 22, 1933

This cause came on to be heard on the transcript of the record from the Board of Tax Appeals and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decision of the said Board of Tax Appeals in this cause be, and the same is hereby, reversed and that this cause be and the same is hereby remanded to the said Board of Tax Appeals for further proceedings not inconsistent with the opinion of this court.

Per Mr. Chief Justice Martin, May 22, 1933.

Mr. Justice Groner dissenting.

[fol. 87] SUPREME COURT OF THE UNITED STATES

No. 145

ORDER ALLOWING CERTIORARI—Filed October 9, 1933

The petition herein for a writ of certiorari to the Court of Appeals of the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 88] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1933

No. 129, No. 130, No. 131, No. 139, No. 140, No. 141, No. 142, [fol. 89] No. 143, No. 144, No. 145, No. 146, No. 147, No. 148, No. 149, No. 150

STIPULATION AS TO RECORDS, ETC.—Filed Nov. 15, 1933

Subject to the approval of the Court, it is hereby stipulated between counsel in the above cases as follows:

1. Only cases numbered 129 and 145 are to be argued. These are to be argued as two separate cases.

[fol. 90] 2. The decision in No. 129 shall control the decision in Nos. 130 and 131 (Nos. 6833 and 6834 in the Circuit Court of Appeals for the Ninth Circuit) and Nos. 139-144, inclusive (Nos. 5664, 5667, 5669, 5671, 5672 and 5674 in the Court of Appeals of the District of Columbia). If judgment shall be rendered for the petitioner in No. 129, the judgments of the courts below shall be reversed in each of the cases mentioned in this paragraph. If judgment shall be rendered for the respondent in No. 129, the judgments of the courts below shall be affirmed in each of the cases mentioned in this paragraph.

3. The decision in No. 145 shall control the decision in Nos. 146-150, inclusive (Nos. 5666, 5668, 5670, 5673 and 5675 in the Court of Appeals of the District of Columbia). If judgment shall be rendered for the petitioner in No. 145, the judgments of the Court of Appeals of the District of Columbia shall be reversed in each of the cases mentioned in this paragraph. If judgment shall be rendered for the respondent in No. 145, the judgments of the Court of Appeals of the District of Columbia shall be affirmed in each of the cases mentioned in this paragraph.

4. In preparing the record to be used in this Court in connection with the argument in No. 129, the Clerk shall include the following matters:

The record as filed with the petition for certiorari.

The opinion of the Court of Appeals of the District of Columbia in No. 139 (No. 5664 in the Court of Appeals of the District of Columbia).

[fol. 91] The stipulation presented in connection with the petition for certiorari.

The order granting certiorari.

This stipulation.

5. In preparing the record to be used in this Court in connection with the argument in No. 145, the Clerk shall include only the following matters:

Docket entires, pp. 1-2.

Decision of the Board of Tax Appeals, pp.-24-25.

Petition for review filed in the Court of Appeals of the District of Columbia, pp. 25-27.

Orders enlarging time, pp. 65-66.

Opinions and judgments of the Court of Appeals of the District of Columbia in Nos. 139 and 145 (Nos. 5664 and 5665 in the Court of Appeals).

The order granting certiorari.

This stipulation.

The Clerk shall also include references only to the various proceedings which appear on pp. 2-24 and 28-64 in the record in No. 129.

6. This stipulation is entered into solely for the purpose of reducing the amount of printing required for the record in these cases. The parties stipulate that either shall have the right to refer in his briefs and oral arguments to any portions of the records in these causes as filed in this Court on petition for certiorari which are not contained in the record as printed pursuant to this stipulation.

Dated at Washington, D. C., this 14 day of November, 1933.

Claude R. Branch, Robert A. Littleton, Attorneys for the Petitioners. J. Crawford Biggs, Solicitor General.

Endorsed on cover: File Nos. 37,748, 37,749, 37,750, 37,751, 37,752, 37,753. District of Columbia Court of Appeals. Term No. 145. Louise A. Whitcomb, petitioner, vs. David Burnet, Commissioner of Internal Revenue. Petion for writ of certiorari and exhibit thereto. Filed June 9, 1933. 145, O. T., 1933; 146, O. T., 1933; 147, O. T., 1933; 148, O. T., 1933; 149, O. T., 1933; 150, O. T., 1933.

OF THE

United States

OCTOBER TERM, 1932

FILE
JUN 9 19
CHARLES ELMORE

Nos. 145 to 150

LOUISE A. WHITCOMB, *Petitioner*,
vs.
DAVID BURNET, Commissioner of Internal Revenue, *Respondent*. (DCA 5665)

LYDIA L. WHITCOMB, *Petitioner*,
vs.
DAVID BURNET, Commissioner of Internal Revenue, *Respondent*. (DCA 5666)

LOUISE A. F. E. WHITCOMB, *Petitioner*,
vs.
DAVID BURNET, Commissioner of Internal Revenue, *Respondent*. (DCA 5668)

LYDIA L. I. WHITCOMB, *Petitioner*,
vs.
DAVID BURNET, Commissioner of Internal Revenue, *Respondent*. (DCA 5670)

LYDIA LOUISE IDA WHITCOMB, *Petitioner*,
vs.
DAVID BURNET, Commissioner of Internal Revenue, *Respondent*. (DCA 5671)

LOUISE A. F. E. WHITCOMB, *Petitioner*,
vs.
DAVID BURNET, Commissioner of Internal Revenue, *Respondent*. (DCA 5675)

PETITION FOR WRITS OF CERTIORARI
to the Court of Appeals of the District of Columbia
and
BRIEF IN SUPPORT THEREOF.

CLAUDE R. BRANCH,
30 State Street, Boston, Massachusetts,
W. W. SPALDING,
Tower Building, Washington, D. C.,
FELIX T. SMITH,
Standard Oil Building, San Francisco, California,
Attorneys for Petitioner.

CHOATE, HALL & STEWART,
30 State Street, Boston, Massachusetts,
MASON, SPALDING & MCATEE,
Tower Building, Washington, D. C.,
PILLSBURY, MADISON & SUTRO,
Standard Oil Building, San Francisco, California,
Of Counsel.

Subject Index

	Page
Petition for writs of certiorari	1
Opinions	2
Jurisdiction	2
Question presented	3
Statutes involved	3
Statement	3
Specification of errors	4
Reasons for granting the writs	4
Brief in support of petition for writs of certiorari	6

Table of Authorities Cited

	Page
Alphin v. Commissioner, 21 B. T. A. 1101, acquiescence by Commissioner, C. B. X-2, p. 2	7
Commissioner v. Freuler, 62 F. (2) 733	7
Merle-Smith v. Commissioner, 42 F. (2) 837	4
Reynolds v. Cooper (Circuit Court of Appeals, 10th Circ., decided Apr. 3, 1933)	4
Whitcomb v. Blair, 58 App. D. C. 104	4, 7

Rulings and Regulations Cited

	Page
G. C. M. 10,273, C. B. XI-2, p. 353	8
G. C. M. 9804, C. B. X-2, p. 353	8

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1932

No.

LOUISE A. WHITCOMB,
Petitioner,
vs.
DAVID BURNET, Commissioner of Internal Revenue,
Respondent.

LYDIA L. WHITCOMB,
Petitioner,
vs.
DAVID BURNET, Commissioner of Internal Revenue,
Respondent.

LOUISE A. F. E. WHITCOMB,
Petitioner,
vs.
DAVID BURNET, Commissioner of Internal Revenue,
Respondent.

LYDIA L. I. WHITCOMB,
Petitioner,
vs.
DAVID BURNET, Commissioner of Internal Revenue,
Respondent.

LYDIA LOUISE IDA WHITCOMB,
Petitioner,
vs.
DAVID BURNET, Commissioner of Internal Revenue,
Respondent.

LOUISE A. F. E. WHITCOMB,
Petitioner,
vs.
DAVID BURNET, Commissioner of Internal Revenue,
Respondent.

PETITION FOR WRITS OF CERTIORARI
to the Court of Appeals of the District of Columbia.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The undersigned, on behalf of the above named petitioners, pray that writs of certiorari issue to review the judgments of the Court of Appeals of the District of Columbia entered on May 22, 1933, in the six cases between the above named parties, docketed therein as Nos. 5665, 5666, 5668, 5670, 5673 and 5675.

OPINIONS.

The opinion of the Board of Tax Appeals is reported in 22 B. T. A. 118. The opinion of the Court of Appeals of the District of Columbia is not yet reported.

JURISDICTION.

The judgments of the Court of Appeals of the District of Columbia were entered May 22, 1933.

The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

These cases involve the question presented by the petitions in John Freuler, Administrator of the Estate of Louise P. V. Whitcomb, Deceased, Petitioner, v. David Burnet, Commissioner of Internal Revenue, Respondent, and companion cases, and in Marguerite T. Whitcomb, Petitioner, v. David Burnet, Commissioner of Internal Revenue, Respondent, and companion cases, filed contemporaneously herewith. (Reference is hereby made to these petitions for the sake of brevity.) They also present an additional question. Even if the court below were right in its disposition of the case of Marguerite T. Whitcomb, petitioners' mother, that the funds received by her were distributable from the trust as income and, therefore, taxable, nevertheless these petitioners claim that since they are remaindermen who will succeed to the trust property upon the termination of the trust and the trust property has suffered depreciation, they are entitled in computing their income tax to deduct this depreciation.

STATUTES INVOLVED.

The statutes involved are those mentioned in the accompanying petitions.

STATEMENT.

These petitioners received income for the years 1921 to 1926 under circumstances set forth in the accompanying petitions. These petitioners were remaindermen entitled to succeed on the termination of the trust to one-half of

the trust property. They are the daughters of Adolph Whitcomb. The latter died in 1914 and was the son of A. C. Whitcomb, the original testator.

SPECIFICATION OF ERRORS.

The Court of Appeals of the District of Columbia erred:

(1) In holding that the order of the state court was not conclusive on the question as to what amounts were properly distributable to the beneficiaries of the trust.

(2) In holding that the trustee was not obliged to withhold from distribution a reasonable allowance for depreciation of the improvements and hotel furniture.

(3) In holding that the taxpayers were not entitled in their income tax returns to deduct their share of the depreciation of the trust property.

(4) In reversing the decision of the Board of Tax Appeals.

REASONS FOR GRANTING THE WRITS.

The reasons set forth in the accompanying petitions require the granting of writs in these cases also, but in these cases there is this additional ground. The decision of the Court of Appeals of the District of Columbia, while taking no notice of the point, reaches a result contrary to its own expression of the law in the earlier case, *Whitcomb v. Blair*, 58 App. D. C. 104, and is opposed to the decisions of the Circuit Court of Appeals for the Second Circuit in *Merle-Smith v. Commissioner*, 42 F. (2d) 837, and for the Tenth Circuit in *Reynolds v. Cooper*, decided

April 3, 1933, and indeed to the decision of the Circuit Court of Appeals for the Ninth Circuit in the companion cases.

Dated, San Francisco, California,
June 2, 1933.

CLAUDE R. BRANCH,
W. W. SPALDING,
FELIX T. SMITH,
Attorneys for Petitioners.

CHOATE, HALL & STEWART,
MASON, SPALDING & MCATEE,
PILLSBURY, MADISON & SUTRO,
Of Counsel.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1932

No.

LOUISE A. WHITCOMB,
Petitioner,
vs.
DAVID BURNET, Commissioner of Internal Revenue,
Respondent.

LYDIA L. WHITCOMB,
Petitioner,
vs.
DAVID BURNET, Commissioner of Internal Revenue,
Respondent.

LOUISE A. F. E. WHITCOMB,
Petitioner,
vs.
DAVID BURNET, Commissioner of Internal Revenue,
Respondent.

LYDIA L. I. WHITCOMB,
Petitioner,
vs.
DAVID BURNET, Commissioner of Internal Revenue,
Respondent.

LYDIA LOUISE IDA WHITCOMB,
Petitioner,
vs.
DAVID BURNET, Commissioner of Internal Revenue,
Respondent.

LOUISE A. F. E. WHITCOMB,
Petitioner,
vs.
DAVID BURNET, Commissioner of Internal Revenue,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

For the statement of the case, and also statement as to the opinions below, jurisdiction, question presented, statutes involved and specification of errors, we refer to the foregoing petition and to the petitions and briefs in accompanying cases, to which reference is there made.

ARGUMENT.

Although the opinion below simply assumes that there is no point of difference between these cases of beneficiaries of the trust who are also remaindermen, we must point out the essential distinction. In its earlier decision, *Whitcomb v. Blair,* 58 App. D. C. 104, 105, the lower court held that "capital losses in such cases fell upon the reversioners or remaindermen, and not upon the life tenant". In the companion cases of beneficiaries who were not remaindermen, the Circuit Court of Appeals for the Ninth Circuit held that "the loss then due to depreciation under the record in the present case is borne by the remaindermen in determining the tax" (*Commissioner v. Freuler,* 62 F. (2d) 733). The result reached by the court below in the instant cases, therefore, creates a direct conflict; not only with its earlier decision, but with that of the Circuit Court of Appeals of the Ninth Circuit. Decisions of other courts in accord with the Ninth Circuit are cited in the foregoing petition. Other similar rulings are *Alphin v. Commissioner,* 21 B. T. A. 1101, acquiescence by

Commissioner C. B. X-2, p. 2; G. C. M. 10,273, C. B. XI-1, pp. 169, 172, and G. C. M. 9804, C. B. X-2, p. 353.

Dated, San Francisco, California,
June 2, 1933.

Respectfully submitted,
CLAUDE R. BRANCH,
W. W. SPALDING,
FELIX T. SMITH,
Attorneys for Petitioners.

CHOATE, HALL & STEWART,
MASON, SPALDING & MCATEE,
PILLSBURY, MADISON & SUTRO,
Of Counsel.

Due service and receipt of a copy of the within is hereby admitted

this_____day of June, 1933.

_____

Attorney General of the United States,

_____

Assistant Attorney General of the United States,

_____

General Counsel of the Bureau of Internal Revenue,

Attorneys for Respondent.

FILE COPY

FILED
NOV 24 1933
CHARLES ELMORE CROPL
CLERK

No. 145

In the Supreme Court of the United States

OCTOBER TERM, 1933

LOUISE A. WHITCOMB, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE PETITIONER

CLAUDE R. BRANCH,
FELIX T. SMITH,
W. W. SPALDING,
ROBERT A. LITTLETON,
Attorneys for Petitioner.

L. H LANE, Law Printer, 221 High Street, Boston.

INDEX.

	Page
Opinions below	1
Jurisdiction	1
Statutes involved	2
Statement	2
Specification of Errors	3
Summary of argument	4
Argument	4
Conclusion	8

CITATIONS

Cases:	
Alphin v. *Commissioner*, 21 B.T.A. 1101	6
Cooper v. *Reynolds*, 60 F. (2d) 650	7
Commissioner v. *Freuler*, 62 F. (2d) 733	5
Duffy v. *Central R. R.*, 268 U. S. 55	5
Merle-Smith v *Commissioner*, 42 F. (2d) 837	4, 5, 6
Palmer v. *Bender*, 287 U. S. 557	5
Lynch v. *Alworth-Stephens Co.*, 267 U. S. 364	5
Helvering v. *Falk*, No. 225	7
Rozburghe v. *United States*, 64 Ct. Cl. 223	6
United States v. *Ludey*, 274 U. S. 295	7
Statutes:	
Revenue Act of 1921, c. 136, 42 Stat. 227, sec. 214	5
sec. 219	2
Judicial Code, Amended by Act of February 13, 1925, Section 240	1
Miscellaneous:	
Cumulative Bulletin X-2, p. 2	6
G.C.M. 9804, Cumulative Bulletin X-2, p. 353	7
G.C.M. 10273, Cumulative Bulletin, XI-1, p. 169	6

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 145

LOUISE A. WHITCOMB, Petitioner

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR PETITIONER.

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R.) is reported in 22 B.T.A. 118. The opinion of the Court of Appeals of the District of Columbia (R. 15) is reported in 65 F. (2d) 803.

JURISDICTION

The judgment of the Court of Appeals was entered on May 22, 1933. Petition for writ of certiorari was filed June 6, 1933. Jurisdiction is conferred on this Court by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATUTES INVOLVED.

The statute involved is Section 219 of the Revenue Act of 1921 (which is printed in the appendix to our brief in No. 129, pages 39-43), and also the following provisions of the Revenue Act of 1921:

> Sec. 214. (a) That in computing net income there shall be allowed as deductions:
>
> * * * * *
>
> (8) A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. In the case of such property acquired before March 1, 1913, this deduction shall be computed upon the basis of its fair market price or value as of March 1, 1913.

STATEMENT

This case arises from the same general state of facts as that involved in No. 129. For brevity we refer to the statement of facts made in our brief in that case. The cases differ only in that this petitioner, while receiving income from the trust, was also a remainderman entitled to succeed on the termination of the trust to one-quarter of the trust property. She is a daughter of Adolph Whitcomb. The latter died in 1914 and was the son of A. C. Whitcomb, the original testator.

The Commissioner of Internal Revenue increased the income shown on this taxpayer's return in the same manner in which he treated the cases of

the other beneficiaries of the trust. The Board of Tax Appeals, sustaining the general contentions advanced by all the beneficiaries of the trust and discussed in our brief in No. 129, therefore did not pass upon the specific questions presented only by the cases of the taxpayers who are remaindermen. The Commissioner filed petitions for review. The Court of Appeals of the District of Columbia, reversing the cases of the other beneficiaries that were before it, reversed this case also, but without discussing the issues presented by this petitioner as remainderman.

SPECIFICATION OF ERRORS

The Court of Appeals of the District of Columbia erred:

1. In holding that the order of the state court was not conclusive on the question as to what amounts were properly distributable to the beneficiaries of the trust.

2. In holding that the trustee was not obliged to withhold from distribution a reasonable allowance for depreciation of the improvements and hotel furniture.

3. In holding that the taxpayers were not entitled in their income tax returns to deduct their share of the depreciation of the trust property.

4. In reversing the decision of the Board of Tax Appeals.

Of these, number 3 is the specification peculiar to the petitioner here as remainderman.

SUMMARY OF ARGUMENT

In this case all of the reasons for reversal exist which are argued in our brief in No. 129. Moreover, in No. 145 an additional reason exists. Summarized briefly it is this—the taxpayer is not only life tenant but also remainderman. The depreciation which the hotel property and other property held by the trustee sustained during the years in question *pro tanto* exhausted the value of the corpus in which she has an interest. Consequently we submit that she should prevail here, even if this Court should reject all of the contentions made in our brief in No. 129—even if it should be held that all amounts paid to these taxpayers were properly distributed to them. See *Merle-Smith* v. *Commissioner,* 42 F. (2d) 837 (C.C.A., 2nd), certiorari denied, 282 U.S. 897.

ARGUMENT

Although the opinion below simply assumes that there is no point of difference between the cases of beneficiaries of the trust who are also remaindermen and those who are not, we must point out the essential distinction. In its earlier decision, *Whitcomb* v. *Blair,* 58 App. D.C. 104, 105, the lower court held that "capital losses in such cases fell upon the reversioners or remaindermen, and not

upon the life tenant." In the companion cases of beneficiaries who were not remaindermen, the Circuit Court of Appeals for the Ninth Circuit said that "the loss then due to depreciation under the record in the present case is borne by remaindermen in determining the tax" (*Commissioner* v. *Freuler,* 62 F. (2d) 733).

As this taxpayer is a remainderman, she consequently is entitled to the deduction for depreciation under the provisions of section 214 (a) (8) of the Act of 1921, which provides that individuals in computing their net income shall be allowed as deductions, *inter alia,*

> "A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence."

It is well settled that general provisions of federal income tax laws allowing deductions for depreciation and the like, such as that in the 1921 Act quoted above, are not restricted to persons owning the legal title. See, for example, *Palmer* v. *Bender,* 287 U.S. 551, 557; *Duffy* v. *Central R. R.,* 268 U.S. 55, 62, 64; *Lynch* v. *Alworth-Stephens Co.,* 267 U.S. 364.

In *Merle-Smith* v. *Commissioner,* 42 F. (2d) 837 (C.C.A. 2nd), a beneficiary receiving income from a testamentary trust was allowed a deduction for depletion of the trust assets because, as the court said:

> "The petitioners have a property right and interest (p. 840).
>
> * * * * *
>
> "The petitioner here has the real interest in the corpus. She possesses every important attribute of ownership. She has a 75 per cent. interest in the income, and she suffers most by the depletion . . . she is in the position of one having others manage her property" (p. 841).

In that case this Court denied the Commissioner's petition for certiorari (282 U.S. 897).

In that case the Circuit Court of Appeals for the Second Circuit distinguished *Roxburghe* v. *United States,* 64 Ct. Cl. 223, upon which the Commissioner relied below, saying that in that case

> "the plaintiff was merely a beneficiary entitled only to income of the trust created for her life. She had no interest in the corpus" (p. 841).

The *Merle-Smith* decision was followed by the Board in *Alphin* v. *Commissioner,* 21 B.T.A. 1101, on the ground stated that

> "it is apparent not only that the beneficiaries had an interest in the income of the trust, but that they had an interest in the corpus in exactly the same proportion" (p. 1106).

Acquiescence of the Commissioner in this decision appears in Cumulative Bulletin X-2, p. 2.

The General Counsel of the Bureau of Internal Revenue has made a similar ruling (G.C.M. 10273, Cumulative Bulletin XI-1, p. 169) because

> "the taxpayer, A, . . . had an interest in the corpus of the C Trust" (p. 172).

The same result was reached in *Cooper* v. *Reynolds*, 60 F. (2d) 650[1]; and G.C.M. 9804, Cumulative Bulletin X-2, p. 353.

In *United States* v. *Ludey*, 274 U.S. 295, 303, this Court declared:

> In essence, the deduction for depletion does not differ from the deduction for depreciation.

The Commissioner in his brief filed in this Court in *Helvering* v. *Falk*, No. 225 (which is to follow this case in argument), states (p. 19):

> We contend that there is no difference in the position of a beneficiary of a trust with regard to depreciation and depletion.

Although that brief does not relate to the tax of a remainderman, we submit that the Commissioner is at least correct in stating that there is no difference in the position of a beneficiary of a trust with regard to depreciation and depletion. Consequently it must follow that if the attitude of the Government on depletion as manifested by its rulings which we have cited above is correct, the petitioner

---

[1]The decision in this case was affirmed by the Circuit Court of Appeals for the Tenth Circuit, 64 F. (2d) 644. The case is now pending in this Court on writ of certiorari as Nos. 227, 229, October Term, 1933.

The opinion of the Circuit Court of Appeals for the Seventh Circuit in the *Falk* case (which does not involve a remainderman) is reported in 64 F. (2d) 171.

here as a remainderman, is entitled to a similar deduction.

CONCLUSION

The judgment of the Court of Appeals should be reversed, and the decision of the Board of Tax Appeals should be affirmed.

Respectfully submitted,

CLAUDE R. BRANCH,
FELIX T. SMITH,
W. W. SPALDING,
ROBERT A. LITTLETON,
Attorneys for Petitioner.

NOVEMBER, 1933.

FILE COPY

FILED
DEC 7 1933
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 145.

LOUISE A. WHITCOMB, *Petitioner*,

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

On Writ of Certiorari to the Court of Appeals of the District of Columbia.

REPLY BRIEF FOR THE PETITIONER.

CLAUDE R. BRANCH,
FELIX T. SMITH,
W. W. SPALDING,
ROBERT A. LITTLETON,
Attorneys for Petitioner.

December, 1933.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

CASES CITED

	Page
Archer-Shee v. Garland, (1931) A. C. 212	3
Civil Code of California, Sections 694 and 695	2
Doctor v. Hughes, 122 N. E. 221	2
Estate of Dixon, 143 Cal. 511	3
Estate of Fair, 132 Cal. 523, 549	3
Estate of Fair, 136 Cal. 79	3
Estate of Sanford, 136 Cal. 97	3
Hofsas v. Cummings, 141 Cal. 525	3
Kaufman v. Commissioner, 44 F. 2d. 144	3
McCurdy v. Otto, 140 Cal. 48	3
Merle-Smith v. Commissioner, 42 F. 2d. 837	1, 4
Moore v. Littel, 41 N. Y. 66	2
Sacramento Bank v. Montgomery, 146 Cal. 745	3
Section 871 of the Civil Code	3
Simpson v. Kamos Realty Co., 166 N. E. 320	2
Williamson v. Field, 2 Sandf. Ch. 586	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 145.

LOUISE A. WHITCOMB, *Petitioner,*

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

On Writ of Certiorari to the Court of Appeals of the District of Columbia.

REPLY BRIEF FOR THE PETITIONER.

Our position has been very simple. As a remainderman, petitioner is one of those who would suffer if the Commissioner's views should prevail in the construction of the will. In such event, therefore, it is clear that she should be allowed the deduction. Precisely similar was *Merle-Smith v. Commissioner,* 42 F. 2d. 837, except that it involved depletion rather than depreciation.

The Commissioner agrees with us that there should be no different rule for depreciation than for depletion.

On other phases of the case, however, the Commissioner's position is somewhat hesitant. Apparently this is due to the pendency of other cases which might be affected by any definite statement the Commissioner might make here. Or it may be he desires not to seem dogmatic in matters of California law.

Thus the Commissioner questions whether the remainder is "technically vested or not." (Res. Br. p. 3.) Though subject to divestment if the remainderman dies before she comes into possession, the remainder is vested under Sections 694 and 695 of the Civil Code of California. These Sections were based on the New York cases, and particularly upon *Williamson v. Field*, 2 Sandf. Ch. 586. That case involved limitations similar to these here, and held the remainders were vested. (See also *Moore v. Littel*, 41 N. Y. 66; *Simpson v. Kamos Realty Co.*, 166 N. E. 320; *Doctor v. Hughes*, 122 N. E. 221.)

The limitation to Harvard College is therefore an executory devise, not, as the Commissioner denominates it, a remainder (Res. Br. p. 4, note 4).

The Commissioner's citation of Section 863 of the Civil Code of California would be pertinent if the remainder interest here were of the character of an "equitable estate". The remainder, however, is a legal estate.* The estate of the trustee is the "whole estate" as long as it lasts. But it must terminate on the death of the *cestui que*

---

*At the time of the will and of the decree of distribution section 857 of the Civil Code provided:

> Express trusts may be created for any of the following purposes: One. To sell real property, and apply or dispose of the proceeds in accordance with the instrument creating the trust. Two. To mortgage or lease real property for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon. Three. To receive the rents and profits of real property, and pay them to or apply them to the use of any person, whether ascertained at the time of the creation of the trust or not, for himself or for his family, during the life of such person, or for any shorter term, subject to the rules of title two of this part; or,

vie. Petitioner, then, has a two-fold interest in this property. As to the life estate she is a mere beneficiary. Section 863 might properly have been cited in that regard. As to the remainder, however, she has the vested legal estate and the code section has no application.

Archer-Shee v. Garland (1931) A. C. 212 (Res. Br. p. 4) must have been cited without having this distinction in mind. It relates to the rights of the beneficiary of a life estate. The remainder was not involved.

The Commissioner speaks loosely, therefore, when he insists that "The property * * * is * * * the property of the trust, not of the petitioner." (Res. Br. pp. 4-5.) If this means "the property of the trustee", it is clearly a mistake. The trustee only has a life estate. Petitioner owns the remainder.

This has induced the Commissioner's next error:

"Depreciation * * * was a loss falling on the trust and not upon the petitioner." (Res. Br. p. 5.)

It has been held that a life tenant can not deduct depreciation. *Kaufman v. Commissioner,* 44 F. 2d. 144. If so, only the remainderman could deduct it.

The Commissioner's argument here repudiates the statements both of the Court below in its earlier opinion and of the Circuit Court of Appeals upon which the former

---

Four: To receive the rents and profits of real property, and to accumulate the same for the purposes and within the limits prescribed by the same title.

This limited a trust of real property to the specific purposes there enumerated. These did not include a trust to convey the legal estate to remaindermen on termination of an equitable life estate.

Estate of Fair, 132 Cal. 523, 549;
Estate of Fair, 136 Cal. 79;
Estate of Sanford, 136 Cal. 97;
McCurdy v. Otto, 140 Cal. 48;
Hofsas v. Cummings, 141 Cal. 525;
Estate of Dixon, 143 Cal. 511;
Sacramento Bank v. Montgomery, 146 Cal. 745.

Section 871 of the Civil Code provided:

When estate of trustee to cease. When the purpose for which an express trust was created ceases, the estate of the trustee also ceases.

The remainder, therefore, takes effect as a legal remainder and the trustee has only a life estate.

court relied in the present case (Pet. Br. pp. 4-5, Res. Br. pp. 5-6). The Commissioner insists:

> It may not be inferred from such a statement, however, that the lower courts held or intended to hold that the depreciation of trust property during the term of the trust and before the extent of the remainder interest passing to the remaindermen could be ascertained was a present loss to the remaindermen for which a deduction might be allowed in computing the taxable net income of the remainder.

But what the Circuit Court of Appeals said was precisely that:

> The loss then due to depreciation under the record in the present case is borne by remaindermen in determining the tax. (R. 159)

Finally, the Commissioner comes to *Merle-Smith v. Commissioner,* 42 F. 2d. 837, and its associated rulings (Pet. Br. pp. 3-7; Res. Br. pp. 6-7). In effect he contends that decision was wrong. He seeks to sweep away not only that case, but the numerous judicial and administrative rulings which follow it. In the *Merle-Smith* case itself, the Commissioner's original position, like his final position on the earlier cases of the remaindermen here, was in accord with what has been the administrative practice since that time. We submit that this should not be reopened.

Respectfully submitted,

CLAUDE R. BRANCH,
FELIX T. SMITH,
W. W. SPALDING,
ROBERT A. LITTLETON,
Attorneys for Petitioner.

December, 1933.

INDEX

	Page
Opinions below	2
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	3
Argument	3
Conclusion	7
Appendix (statutes)	8

CITATIONS

Cases:	
Anderson v. *Wilson*, 289 U.S. 20; 51 F. (2d) 268; 60 F. (2d) 52	4
Baltzell v. *Mitchell*, 3 F. (2d) 428, certiorari denied, 268 U.S. 690	4
Commissioner v. *Freuler*, 62 F. (2d) 733	6
Falk v. *Commissioner*, 64 F. (2d) 171	5
Freuler, John, v. *Commissioner*, Nos. 129, 130, 131, October Term 1933	3
Lynch v. *Alworth-Stephens Co.*, 267 U.S. 364	6
Merchants' L. & T. Co. v. *Smietanka*, 255 U.S. 509	4
Merle-Smith v. *Commissioner*, 42 F. (2d) 837, certiorari denied, 282 U.S. 897	5
Reynolds v. *Cooper*, 64 F. (2d) 644	5
Weiss v. *Wiener*, 279 U.S. 333	6
Whitcomb v. *Blair*, 25 F. (2d) 528	4, 6
Statutes:	
Revenue Act of 1921, c. 136, 42 Stat. 227, 239, 246:	
Sec. 214	8
Sec. 219	5
Revenue Act of 1924, c. 234, 43 Stat. 253:	
Sec. 214 (U.S.C., Title 26, Sec. 955)	8
Sec. 219 (U.S.C., Title 26, Sec. 960)	5
Revenue Act of 1926, c. 27, 44 Stat. 9:	
Sec. 214 (U.S.C. App., Title 26, Sec. 955)	8
Sec. 219 (U.S.C. App., Title 26, Sec. 960)	5
Revenue Act of 1928, c. 852, Sec. 23, 45 Stat. 791	5

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 145

LOUISE A. WHITCOMB, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

No. 146

LYDIA L. WHITCOMB, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

No. 147

LOUISE A. F. E. WHITCOMB, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

No. 148

LYDIA L. I. WHITCOMB, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

No. 149

LYDIA LOUISE IDA WHITCOMB, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

No. 150

LOUISE A. F. E. WHITCOMB, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR WRITS OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 15–24) is reported in 22 B.T.A. 118. The opinion of the Court of Appeals (R. 69) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered May 22, 1933 (R. 69–70). The petition for writs of certiorari was filed June 9, 1933. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The question is the same as that presented in the accompanying cases numbered 139–144, except that the petitioners hold interests in remainder as well as life interests under the testamentary trust created by A. C. Whitcomb, deceased. They are the daughters of the testator's deceased son Adolph.

STATUTES INVOLVED

The applicable statutes are those set forth in the Brief in Opposition in the accompanying cases numbered 129, 130, and 131, this term. Certain additional statutory provisions become relevant by reason of the argument predicated upon the fact that the beneficiaries here are remaindermen as well as life beneficiaries. These statutes are set forth in the Appendix, *infra*, p. 8.

STATEMENT

The facts are stated in the Brief in Opposition filed concurrently herewith in the accompanying cases numbered 129, 130, and 131, to which this Court is respectfully referred. There is this difference, that the petitioners here were the owners of remainder as well as life interests under the testamentary trust created by A. C. Whitcomb.

ARGUMENT

The reasoning and authorities advanced in opposition to certiorari in the accompanying cases of *John Freuler, Administrator of the Estate of Louise P. V. Whitcomb* v. *Commissioner,* Nos. 129, 130, 131, this term, are equally applicable here and reference thereto is respectfully made.

The court below made no distinction in its disposition of the cases based upon the fact that some of the taxpayers held life interests only and others, here involved, were not only life beneficiaries but owned interests in remainder. The petitioners, however, urge this distinction as an additional ground for the issuance of the writs.

The petitioners here were the daughters of Adolph Whitcomb, the testator's son, who died in 1914, and Marguerite T. Whitcomb, one of the petitioners in the allied cases numbered 139–144. As such they were entitled to, and in fact received, recurring distributions of trust income before and during the taxable years. The amounts of these

distributions were not affected by the fact that the petitioners held remainder interests—they were distributions of income *qua* income. The trustee was empowered to distribute nothing but income during the life of the trust.

The fact that these beneficiaries held remainder interests would seem not to entitle them to take a deduction from the income they received on account of depreciation. *Merchants' L. & T. Co.* v. *Smietanka,* 255 U.S. 509; *Anderson* v. *Wilson,* 289 U.S. 20. In the *Anderson case* residuary legatees received a partial distribution of the proceeds of property sold by the trust at a loss. They claimed the deduction of a loss. The District Court allowed to each beneficiary his entire share of the loss (51 F. (2d) 268 (S.D.N.Y.)). The Circuit Court of Appeals permitted the deduction to the extent that there was a distribution of the proceeds of the building (60 F. (2d) 52 (C.C.A. 2d)). Had there been no present distribution of corpus, the Circuit Court of Appeals would have allowed no deduction. This Court, in effect reversing both courts below, held that the trust alone had suffered the loss and no deduction was allowable to the beneficiaries. The Court approved the doctrine of *Baltzell* v. *Mitchell,* 3 F. (2d) 428 (C.C.A. 1st), certiorari denied, 268 U.S. 690, *Whitcomb* v. *Blair,* 25 F. (2d) 528 (App.D.C.), and allied cases upon which we rely in the other cases presented with these.

Trusts are taxable as separate entities under all the Revenue Acts here involved. Individuals are permitted a reasonable allowance for depreciation "of property used in the trade or business."[1] Where the property is held in trust, this deduction is to be taken by the fiduciary.[2] There is no provision in the statute which permits an apportionment as between the fiduciary and beneficiary in the case of depreciation. The significance of this omission is emphasized by the fact that Congress has specifically provided for such an apportionment in other connections, as, for instance, in the case of lessor and lessee claiming depletion.[3] Still more significant is the provision first incorporated in Section 23 (k) of the Revenue Act of 1928, c. 852, 45 Stat. 791, 799, which permits the apportionment of depreciation between trustees and beneficiaries. It is clear, therefore, that there is no authority in the statute for the deduction claimed.

The petitioners assert a conflict with several cited cases. To *Merle-Smith* v. *Commissioner,* 42 F. (2d) 837 (C.C.A. 2d), certiorari denied, 282 U.S. 897, and *Reynolds* v. *Cooper,* 64 F. (2d) 644 (C.C.A. 10th), relied upon in this connection (Pet. 4), petitioners might have added *Falk* v. *Commissioner,* 64 F. (2d) 171 (C.C.A. 7th). These decisions

[1] Section 214 (a) (8), Revenue Acts of 1921, 1924, and 1926.
[2] Section 219 (b), Revenue Acts of 1921, 1924, and 1926.
[3] Section 214 (a) (10), Revenue Act of 1921; Section 214 (a) (9), Revenue Acts of 1924 and 1926.

sustain the allowance of depletion to trust beneficiaries entitled to royalties, apparently without regard to whether or not they hold interests in remainder. The conclusion in these cases seems to rest upon the peculiar incidents of depletion. See *Weiss* v. *Wiener*, 279 U.S. 333. This Court has already held that depletion in the case of a mine is to be allowed to everyone whose property right and interest is diminished by extraction and disposition of the deposit. *Lynch* v. *Alworth-Stephens Co.*, 267 U.S. 364. For purposes of depletion each dollar removed from the property is in effect a distribution of corpus.

The reference to an alleged conflict with the earlier decision of the Court of Appeals in *Whitcomb* v. *Blair*, *supra* (Pet. 4), and with the decision of the Circuit Court of Appeals for the Ninth Circuit in *Commissioner* v. *Freuler*, 62 F. (2d) 733 (Pet. 7), pending upon petitions as Nos. 129, 130, 131, this term, does not seem to merit an extended response. Neither *Whitcomb* v. *Blair* nor *Commissioner* v. *Freuler*, *supra*, dealt with beneficiaries having remainder interests, and whatever may have been said in that connection was not necessary to the conclusion reached. Moreover, *Whitcomb* v. *Blair* was decided by the same court which decided the present cases, so that the language on which the petitioners rely, if it be in fact inconsistent, must be regarded as having been definitely repudiated.

CONCLUSION

There is no conflict of authority. For the reasons which are set forth in this brief, read in conjunction with the brief filed concurrently in Nos. 129, 130, 131, this term, the decision of the court below is believed to be correct and the petition should be denied.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.

SEWALL KEY,
Special Assistant to the Attorney General.

WM. CUTLER THOMPSON,
ERWIN N. GRISWOLD,
Attorneys.

JULY, 1933.

APPENDIX

STATUTES INVOLVED

Revenue Act of 1921, c. 136, 42 Stat. 227, 239:

> SEC. 214. (a) That in computing net income there shall be allowed as deductions:
>
> * * * * *
>
> (8) A reasonable allowance for the exhaustion, wear, and tear of property used in the trade or business, including a reasonable allowance for obsolescence. In the case of such property acquired before March 1, 1913, this deduction shall be computed upon the basis of its fair market price or value as of March 1, 1913; * * *.

Revenue Act of 1924, c. 234, 43 Stat. 253, 269:

> SEC. 214. (a) In computing net income there shall be allowed as deductions:
>
> * * * * *
>
> (8) A reasonable allowance for the exhaustion, wear, and tear of property used in the trade or business, including a reasonable allowance for obsolescence; * * *

(U.S.C., Title 26, Sec. 955.)

The language of the preceding section is carried over into Section 214 (a) (8) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 26 (U.S.C.App., Title 26, Sec. 955).

U. S. GOVERNMENT PRINTING OFFICE: 1938

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement	2
Argument	3
Conclusion	7

CITATIONS

Cases:

Abell v. *Tait*, 30 F. (2d) 54 — 4

Anderson v. *Wilson*, 289 U.S. 20 — 4, 5

Archer-Shee v. *Garland*, [1931] A.C. 212 — 4

Baltzell v. *Mitchell*, 3 F. (2d) 428 — 4

Busch v. *Commissioner*, 50 F. (2d) 800 — 4

Commissioner v. *Freuler*, 62 F. (2d) 733, No. 129, Oct. Term, 1933 — 2, 5

Falk v. *Commissioner*, 64 F. (2d) 171, No. 225, Oct. Term, 1933 — 6

Merchants' Loan & Trust Co. v. *Smietanka*, 255 U.S. 509 — 4

Merle-Smith v. *Commissioner*, 42 F. (2d) 837, certiorari denied, 282 U.S. 897 — 6

Nixon v. *Lucas*, 42 F. (2d) 833 — 5

Reynolds v. *Cooper*, 64 F. (2d) 644, Nos. 227–229, Oct. Term, 1933 — 6

Whitcomb v. *Blair*, 25 F. (2d) 528 — 6

Statute:

California Civil Code, Sec. 863 — 4

22707—33

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 145

LOUISE A. WHITCOMB, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 32–53 in No. 129) is reported in 22 B.T.A. 118. The opinion of the Court of Appeals (R. 11) is reported in 65 F. (2d) 809. This opinion rests on the opinion of the same court in a related case (R. 15–27), which is reported in 65 F. (2d) 803.[1]

[1] By a stipulation between the parties (R. 28–29) the decision of the Court in this case is to control the decisions in Nos. 146–150, inclusive, also pending on writs of certiorari to the Court of Appeals of the District of Columbia. The present petitioner is also petitioner in Nos. 147 and 150, and her sister is petitioner in Nos. 146, 148 and 149. Both petitioners are potential remaindermen as well as income beneficiaries under the trust in question. See Appendix B (p. 51) of the Government's brief in No. 129.

JURISDICTION

The judgment of the Court of Appeals was entered May 22, 1933 (R. 11–12). The petition for a writ of certiorari was filed June 9, 1933, and was granted October 9, 1933 (R. 27). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The questions are the same as those presented in No. 129, except that the petitioner here is a potential remainderman under the trust created by the will of A. C. Whitcomb, as well as a beneficiary of trust income.

STATUTES INVOLVED

The statutes involved are set forth in Appendix A to the Government's brief in No. 129.

STATEMENT

The facts are the same as those set forth at pp. 3–9 of the respondent's brief in *Freuler* v. *Helvering*, No. 129, October Term, 1933, which is to be argued just before this case.

The petitioner here is the daughter of Adolph Whitcomb, and the granddaughter of A. C. Whitcomb. See Appendix B (p. 51) of the respondent's brief in No. 129. The petitioner has received distributions of income under the will of A. C. Whitcomb as one of the representatives of her deceased father. She is also entitled under the will to share in the remainder of the estate upon the termination of the trust at the death of the testator's

daughter, Charlotte Andree, if she is then living (R. 34–35, in No. 129).

The fact that the present petitioner may be a remainderman is the only distinction between this case and No. 129.

ARGUMENT

The petitioner contends that she has a remainder interest in the trust estate and is, therefore, entitled to a deduction for depreciation of the trust property, even if the deduction sought by the beneficiaries who are not remaindermen may not be allowed. The court below rejected this contention and disposed of the present case upon the authority of its decision in the case of one of the beneficiaries who has no remainder interest (R. 11, 15–27). We submit that the decision below is correct and that no deduction may be allowed the petitioner on account of depreciation sustained by the trust property during the taxable years.

The petitioner's remainder interest, whether technically vested or not, is not certain to come into possession. The will of A. C. Whitcomb gave the remainder after the death of his two children to the descendants of the two children (of whom the petitioner is one), "if any be alive at the time of the death of the said two children; and if none be alive at that time, to Harvard College, * * *." It is plain, therefore, that it cannot now be told whether the petitioner will ever receive any of the corpus of the trust. Under these circumstances, we submit that there is

no basis for the allowance to her of a deduction on account of the depreciation of the trust property.[2]

Even if the petitioner's interest were vested and certain to come into possession, we submit that it would afford no basis for the allowance to her of a deduction on account of depreciation of the trust property in computing her individual taxable net income during the taxable years. Under the law of California, she had "no estate or interest in the property."[3] *Cf. Archer-Shee* v. *Garland*, [1931] A.C. 212, which involved the nature of the interest of the beneficiary under a similar New York statute. Since she had no estate or interest in the property, it seems obvious that she is not entitled to a deduction on account of a loss sustained by the property.

Moreover, Congress has provided in the Revenue laws that a trust and its beneficiaries shall be separate taxable entities. *Anderson* v. *Wilson*, 289 U.S. 20; *Merchants' Loan & Trust Co.* v. *Smietanka*, 255 U.S. 509; *Busch* v. *Commissioner*, 50 F. (2d) 800, 801 (C.C.A. 5th); *Abell* v. *Tait*, 30 F. (2d) 54, 55 (C.C.A. 4th); *Baltzell* v. *Mitchell*, 3 F. (2d) 428 (C.C.A. 1st). The property here in question is a part of the corpus of the trust estate and is for tax

[2] Under the statute, Harvard College is exempt from tax. But if it were taxable, it could scarcely be contended that it would be entitled to a deduction from *its* income on account of depreciation of the trust property. The present petitioner is in no better position in this respect, we submit, than is the ultimate remainderman.

[3] California Civil Code, Sec. 863: "Except as hereinafter otherwise provided, every express trust in real property, valid as such in its creation, vests the whole estate in the trustees, subject only to the execution of the trust. The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust."

purposes the property of the trust, not of the petitioner. Depreciation sustained in respect of that property during the taxable year was a loss falling on the trust and not upon the petitioner, and the deduction which Congress has allowed on account of depreciation may be taken only by the trust as a distinct and independent taxpayer.

Section 219 of the statute requires the petitioner to return her full distributable share of income for taxation and does not authorize any deduction by a beneficiary on account of depreciation of the trust property. The mere fact that the petitioner held a remainder interest in the corpus of the trust estate does not make the loss suffered by the trust through depreciation of trust property a loss sustained by the petitioner in the taxable years, any more than a loss suffered by a corporation is a loss sustained by one of its stockholders for tax purposes. *Nixon* v. *Lucas*, 42 F. (2d) 833 (C.C.A. 2d). The property was not then the property of the petitioner. As remainderman she is entitled only to share in the remnant of the property after termination of the trust. Her right as remainderman is to receive the property such as it may be when the trust is terminated. In the interim the property belongs to the trust and any loss in respect thereof is the loss of the trust, not of the petitioner. *Anderson* v. *Wilson*, *supra*.

The decision below is not in conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in *Commissioner* v. *Freuler*, 62 F. (2d) 733, now pending as No. 129, October Term, 1933, or

the decision of the court below in *Whitcomb* v. *Blair*, 25 F. (2d) 528, involving the right of another beneficiary of this same trust to a deduction for depreciation in determining the tax for an earlier year. Both courts, in holding that the beneficiary was not entitled to a deduction for depreciation of the trust property, said that such depreciation was a loss falling upon or borne by the remaindermen. It may not be inferred from such a statement, however, that the lower courts held, or intended to hold, that depreciation of trust property during the term of the trust and before the extent of the remainder interest passing to the remaindermen could be ascertained was a present loss to the remaindermen for which a deduction might be allowed in computing the taxable net income of the remaindermen. Until the trust was terminated it could not be known what property would pass to the remaindermen. They are entitled only to what is left of the property after conclusion of the trust. During the term of the trust the property belonged to it and was subject to the uses and purposes of the trust. The depreciation sustained on the property during the life of the trust is a loss to the trust and not to the beneficiaries or the remaindermen. Such a loss may reduce the interest ultimately passing to the remaindermen, but it is not a present loss sustained by them.

Merle-Smith v. *Commissioner*, 42 F. (2d) 837 (C.C.A. 2d), certiorari denied, 282 U.S. 897, *Falk* v. *Commissioner*, 64 F. (2d) 171 (C.C.A 7th), and *Reynolds* v. *Cooper*, 64 F. (2d) 644 (C.C.A. 10th),

are referred to as in conflict with the decision below. In each of those cases a deduction for depletion of mining property or oil and gas wells held in trust was allowed to beneficiaries entitled to the income derived by the trust from such properties. We submit that the decisions in those cases are unsound. The *Falk* and *Cooper* cases are now before this Court on writs of certiorari, Nos. 225 and 227–229, October Term, 1933, and the brief for the petitioner in the *Falk* case, to which reference is respectfully made, sufficiently sets forth our views on the question. If the decisions in those cases are correct, it must be because of reasons peculiar to depletion, although we contend that there is no distinction between depletion and depreciation so far as that question is concerned.

CONCLUSION

The court below correctly held that the petitioner, a beneficiary of trust income, is taxable upon her full distributive share of the trust income, undiminished by depreciation of trust property, and is not entitled individually to a deduction for depreciation of the trust property. The decision below is correct and should be affirmed.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.
ERWIN N. GRISWOLD,
SEWALL KEY,
JOHN MACC. HUDSON,
Special Assistants to the Attorney General.

DECEMBER, 1933.

U. S. GOVERNMENT PRINTING OFFICE: 1933

SUPREME COURT OF THE UNITED STATES.

No. 145.—October Term, 1933.

Louise A. Whitcomb, Petitioner, *vs.* Guy T. Helvering, Commissioner of Internal Revenue. } On Writ of Certiorari to the Court of Appeals of the District of Columbia.

[January 8, 1934.]

Mr. Justice Roberts delivered the opinion of the Court.

This case was brought here by writ of certiorari.[1] The petitioner is a beneficiary of the trust created by the will of A. C. Whitcomb, and her status[2] differs from that of the petitioner in No. 129 (*ante*, p. —) only in the respect that she has a vested remainder, subject, in certain events, to be divested in favor of Harvard College. The Court of Appeals did not make that circumstance the basis of any distinction between her case and that of Freuler (No. 129). The petitioner therefore makes the same contentions which are there considered; but claims also if her interest in the trust corpus by way of remainder is given effect, it does not follow that an affirmance in No. 129 requires the like result in her case. As we reverse the judgment in No. 129 and the reasons given in our opinion apply in this case, we have no occasion to pass upon the added feature presented by the remainder interest of the petitioner.

For the reasons set forth in the opinion in No. 129 the judgment must be reversed.

So ordered.

Mr. Justice Brandeis, Mr. Justice Stone and Mr. Justice Cardozo, dissent.

---

[1]See 22 B. T. A. 118; 65 F. (2d) 803, 809.

[2]Companion cases in the Board of Tax Appeals and the Court of Appeals of the District of Columbia, which involve the tax liability of other beneficiaries of the same trust, under like circumstances, were brought up by certiorari. They are Nos. 146 to 150, inclusive. By stipulation filed in this court, the parties agree that if the judgment in No. 145 is reversed a like judgment shall be entered in the other cases; and if that judgment is affirmed a like judgment shall be entered in the others.